

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

| | | |
|-------------------------------|---|----------------------|
| In the Matter of |) | |
| |) | |
| Communications Assistance for |) | ET Docket No. 04-295 |
| Law Enforcement Act and |) | |
| Broadband Access and Services |) | RM-10865 |

**OPPOSITION OF THE UNITED STATES
DEPARTMENT OF JUSTICE TO REQUEST FOR STAY**

The United States Department of Justice, including the Federal Bureau of Investigation and the Drug Enforcement Administration, hereby opposes the November 23, 2005 request to stay the Commission's First Report and Order in the above-captioned proceeding.¹ The Requestors fail to make any of the four showings required for grant of a stay. Accordingly, the Commission should stand by its original decision to move the Communications Assistance for Law Enforcement Act ("CALEA") implementation process forward by denying the request for further delay.

Introduction

On August 5, 2005, the Commission adopted a "first critical step to apply CALEA obligations to new technologies and services that are increasingly relied upon by the American public to meet their communications needs."² In so doing, the

¹ Center For Democracy & Technology et al. Request For Stay Pending Issuance of Subsequent Orders and For Stay Pending Judicial Review (filed Nov. 23, 2005) ("Stay Request"). The parties to the Stay Request are collectively referred to herein as "Requestors."

² *In the Matter of Communications Assistance for Law Enforcement Act and Broadband Access and Services*, First Report and Order and Further Notice of Proposed Rulemaking, ET Docket No. 04-295; RM 10865, FCC 05-153, (rel. Sept. 23, 2005) ("CALEA Broadband Order") ¶ 1.

Commission expressly concluded that CALEA applies to facilities-based broadband Internet access providers and providers of interconnected voice over Internet protocol (“VoIP”) service and sought to “focus debate on implementation rather than applicability”³ The Commission took this two-step approach in order to “enable [providers] to begin planning” and to “ensure that the appropriate parties become involved in ongoing discussions”⁴

Because the Commission realized that providers would need time to come into compliance, it delayed the compliance date for newly covered providers and services for 18 months.⁵ The Commission specifically found that “based on the record, 18 months is a reasonable time period to expect all providers of facilities-based broadband Internet access services and interconnected VoIP service to comply with CALEA.”⁶

Requestors now ask the Commission to reverse course by seeking a delay of the compliance deadline.⁷ Advancing many of the same claims that the Commission rejected in the *CALEA Broadband Order*, Requestors ask that any target date for compliance be put off indefinitely. Because Requestors cannot meet any of the four criteria necessary for a stay, there is no reason for the Commission to abandon the implementation path it laid out in the *CALEA Broadband Order*.

³ *Id.* ¶ 3.

⁴ *Id.*

⁵ *CALEA Broadband Order* ¶ 46 & n.138.

⁶ *Id.*

⁷ Stay Request at 20.

Standard

A request for stay of Commission action must meet four separate requirements in order to be granted. The requestor “must demonstrate (1) that it is likely to prevail on the merits; (2) that it will suffer irreparable harm if a stay is not granted; (3) that other interested parties will not be harmed if the stay is granted; and (4) that the public interest favors grant of the stay.”⁸ “The most important of these factors is irreparable harm, without which other factors need not be considered.”⁹ In cases where delay is sought based on court review, the Commission has said that the requestor must meet a “stringent standard.”¹⁰ Where the requestor offers nothing more than an unsubstantiated belief that they will win an appeal, the Commission has repeatedly declined to stay its actions.¹¹

⁸ *In the Matter of Revisions to Broadcast Auxiliary Service Rules in Part 74 and Conforming Technical Rules for Broadcast Auxiliary Service, Cable Television Relay Service and Fixed Service in Parts 74, 78 and 101 of the Commission’s Rules*, Order, 18 FCC Rcd. 21,134 (2003) (“*Broadcast Auxiliary Service Rules Order*”) ¶ 9 (citing *Virginia Petroleum Jobbers Ass’n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958), modified in *Washington Metropolitan Area Transit Commission v. Holiday Tours*, 559 F.2d 841, 843 (D.C. Cir. 1977))

⁹ *In the Matter of Telmex/Sprint Communications, L.L.C.*, Order, 13 FCC Rcd 15,678 (1998) (“*Telmex/Sprint Order*”) ¶ 4 (citing prior Commission and D.C Circuit cases).

¹⁰ *In the Matter of Request of Columbia Capital Corporation for a Stay of the 220 MHz Service Application and Auction Schedule*, Order, 13 FCC Rcd 17,863 (1998) ¶ 2.

¹¹ See, e.g., *In the Matter of Emergency Motions of Small Business in Telecommunications for Stay of the 800 MHz Specialized Mobile Radio (SMR) Service Auctions*, Order, 15 FCC Rcd 12, 828 (2000) ¶ 3; *In the Matter of Motion of Ranger Cellular and Miller Communications, Inc. for a Stay of the Cellular Rural Service Areas Auction No. 45*, Order, 17 FCC Rcd 9320 (2002) (“*Ranger and Miller Order*”) ¶ 5.

Argument

I. The Requestors Have Failed to Meet Any of the Four Requirements to Justify a Stay of the Commission's *CALEA Broadband Order*

- a. The Requestors Are Not Likely to Succeed on the Merits of Their Claim That the Commission Improperly Interpreted CALEA

In order to have its request for a stay granted, a requestor must be able to show that it is likely to succeed on the merits of its claim.¹² A requestor cannot rely on “highly speculative” assertions of likelihood of success that are “based on nothing more than their belief in the merits of their own case.”¹³ In fact, where the requestor’s legal claims have been rejected in the order for which a stay is sought, the Commission will similarly reject a request for stay of an order unless the motion can present “new legal authority to support a different conclusion.”¹⁴

Here, Requestors offer no new legal authority. The assertion that they will succeed on the merits of their claims is nothing more than a rehashing of their earlier positions. Requestors acknowledge that the same arguments they advance in their request have already been “extensively briefed in prior comments to the Commission.”¹⁵ In fact, the Requestors explicitly incorporate their earlier comments, demonstrating that their arguments have already been both considered and rejected by the Commission.¹⁶

¹² *Broadcast Auxiliary Service Rules Order* ¶ 9 (citing *Virginia Petroleum Jobbers Ass’n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958), *modified in Washington Metropolitan Area Transit Commission v. Holiday Tours*, 559 F.2d 841, 843 (D.C. Cir. 1977)).

¹³ *Ranger and Miller Order* ¶ 5.

¹⁴ *Id.*

¹⁵ Stay Request at 15-16.

¹⁶ See Stay Request at 15 & n.13; *CALEA Broadband Order* ¶ 21 & n.68 (noting comments of parties including at least one of the Requestors).

The Commission's *CALEA Broadband Order* is well-supported by the text, legislative history, and policies underlying CALEA, and therefore is likely to be upheld on judicial review. Requestors offer no new reason for the Commission to retreat from the implementation path it laid out in the *CALEA Broadband Order*. Accordingly, the request for stay of the *CALEA Broadband Order* should be denied.

b. Requestors Will Not Suffer Irreparable Injury

In addition to demonstrating a likelihood of success on the merits, a requestor seeking a stay must also show that it will suffer irreparable injury if the stay is not granted.¹⁷ Generally, “[i]rreparable harm must be more than economic loss.”¹⁸ Moreover, “[e]ven if the alleged harm is not fully remediable, the irreparable harm factor is not satisfied absent a demonstration that the harm is “both certain and great; ... actual and not theoretical.”¹⁹ The Commission has largely rejected arguments that costs that could become unnecessary if Commission action is reversed would qualify as irreparable harm.²⁰ Moreover, parties seeking a stay must show that they, and not third parties, will suffer irreparable harm.²¹

¹⁷ *Broadcast Auxiliary Service Rules Order* ¶ 9 (citing *Virginia Petroleum Jobbers Ass’n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958), modified in *Washington Metropolitan Area Transit Commission v. Holiday Tours*, 559 F.2d 841, 843 (D.C. Cir. 1977)).

¹⁸ *Telmex/Sprint Order* ¶ 6.

¹⁹ *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Order, 11 FCC Rcd 20,166, 20,170 (1996) ¶ 10.

²⁰ *In re Applications of Metromedia Radio & Television, Inc. (Assignor) to News America Television Incorporated (Assignee) For Assignment of Licenses for Television Stations WNEW-TV and W64AA (Translator), New York, New York; KTTV, Los Angeles, California; KRLD-TV, Dallas, Texas; KRIV-TV, Houston, Texas; and WTTG, Washington, D.C.*, Order, 59 Rad. Reg. 2d (P & F) 1209 (1986) (“*Metromedia Order*”) ¶ 4.

²¹ *Id.* ¶ 6 (citing *In re Teleprompter Corporation, Memorandum Opinion and Order*, 87 F.C.C.2d 531 (1981)).

The only harm that Requestors identify is the potential that some effort that they allege will be undertaken by some providers to prepare to comply with CALEA could become unnecessary, if those providers either are granted exemption from all or some of CALEA's requirements or go astray in attempting to do what the statute requires. Even if these efforts do in fact become unnecessary, Requestors have not even attempted to quantify the amount of such alleged possible loss.²² This is exactly the type of speculative and unquantified harm that the Commission has said does not meet the standard that the harm be both "certain and great" In any event, as discussed more fully in Section II below, Requestors can avoid any reasonable prospect for harm by following the statutorily prescribed method for obtaining additional time within which to achieve compliance.²³²⁴

A requestor's failure to demonstrate irreparable harm is fatal in and of itself to a request for stay. Here, Requestors offer nothing more than speculation of possible future economic harm – harms that they have a statutory method to avoid should it become necessary. Because the harms Requestors allege are neither "certain" nor "great," their request can be and should be denied on this ground alone.

²² To the extent that Requestors attempt to rely on other parties' losses, such alleged losses by others are not relevant to their request. *See Metromedia Order* ¶ 4.

²³ 47 U.S.C. § 1008.

²⁴ To the extent that Requestors' claim that innovation will be impacted constitutes a separate argument, the Commission has already explicitly rejected any claim that innovation will be unduly restricted. *See CALEA Broadband Order* ¶ 2 (finding that the Order "strikes the right balance between fostering competitive broadband and advanced services deployment and *technological innovation* on the one hand, and meeting the needs of law enforcement community on the other") (emphasis added).

c. Other Parties and the Public Interest Will Be Harmed By Further Delays in CALEA Implementation

The Commission explicitly found in the *CALEA Broadband Order* that CALEA coverage of broadband Internet access service and interconnected VoIP services to CALEA serves the public interest.²⁵ Although they clearly continue to disagree with the Commission's conclusions, Requestors have not offered any new information that could or should cause the Commission to change its conclusion.

The central purpose of CALEA is to ensure that the critical public interest in effective law enforcement and national security investigations is not frustrated by the technical inability of telecommunications carriers to carry out authorized electronic surveillance.²⁶ Notwithstanding Requestors' continued assertions to the contrary, the Commission has already recognized the "overwhelming importance of CALEA assistance capabilities to law enforcement efforts to safeguard national security and combat crime."²⁷ The Commission explicitly found that "excluding interconnected VoIP from CALEA coverage could significantly undermine law enforcement's surveillance efforts."²⁸ The inability to investigate serious crimes and threats to our national security effectively harms us all. Ad hoc efforts at "voluntary cooperation" outside the CALEA framework are no substitute for ensuring that a provider's equipment and services are actually able to execute surveillance orders completely and expeditiously, as CALEA requires.

²⁵ *CALEA Broadband Order* ¶¶ 32-35, 43-44.

²⁶ *Id.* ¶ 21 (citing CALEA Legislative History, H.R. Rep. No. 103-827(I) (1994), reprinted in 1994 U.S.C.C.A.N. 3489).

²⁷ *Id.* ¶ 35.

²⁸ *Id.* ¶ 44.

Moreover, the Commission has determined that applying CALEA to functionally equivalent services is necessary to prevent a “skewing effect on competition.”²⁹ It follows that a stay would harm those service providers who implement CALEA solutions while functionally equivalent services continue to delay. Thus, the Commission has already rejected Requestors’ claim that no other parties, including “companies that are voluntarily complying with CALEA,” will be harmed by a stay.

The principles underlying Requestors’ arguments that a stay would harm no one have already been rejected by the Commission. The request should be denied because a stay would undermine the ability to implement court orders and would produce a “skewing effect on competition.”

II. Requestors’ Claim That the Deadline Should Be Stayed Because the Deadline Itself is Arbitrary and Capricious Should Be Rejected.

Requestors also purport to seek a stay “pending further Commission proceedings,” but in fact go on to argue that the Commission’s decision to set this or *any* deadline is arbitrary and capricious.³⁰ Further, to the extent Requestors’ attack on the Commission’s reasoning in the *CALEA Broadband Order* could be considered a stay request, Requestors do not even attempt to satisfy the four requirements for grant of a stay (as discussed above). Such an end run around the proper standard for Commission consideration of a stay request should not be allowed. Nevertheless, none of the arguments Requestors put forth are availing.

²⁹ *CALEA Broadband Order* ¶ 33.

³⁰ Stay Request at 5-15 (emphasis added).

First, Requestors object to the setting of any uniform deadline because individual circumstances could require more time for some providers than for others.³¹ The CALEA statute itself provides a method for any provider who believes that compliance is not reasonably achievable to petition for relief based on the provider's particular circumstances.³² Such relief could include additional time in which to implement assistance capabilities.³³ The speculative possibility that particular providers may need additional time is no justification for a wholesale suspension of the compliance deadline with respect to all providers, including those who can readily bring themselves into compliance by the Commission's deadline.

Second, Requestors contend that a stay is needed now because providers will not be able to comply with CALEA almost a year and a half from now due to their professed confusion about precisely what the statute requires.³⁴ This argument fails for a number of reasons. First, Requestors seem to imply that (1) no useful work can be done before every legal question is finally determined and (2) that any necessary legal questions cannot be resolved in sufficient time to meet the deadline. Neither proposition is supported by the record or the request. Accordingly, there is no reason why the compliance deadline for all covered providers should be put on hold indefinitely to await the outcome of a process that may not result in any modifications of compliance requirements at all.

³¹ *Id.* at 7.

³² 47 U.S.C. § 1008.

³³ For further explanation, see Comments of the United States Department of Justice, ET Docket No. 04-295 (filed Nov. 8, 2004) at 66-69.

³⁴ Stay Request at 7-9.

Moreover, whereas Requestors seem to believe that the next required action toward compliance must come from the Commission, the fact is that it is providers who will drive the next step of the process. Carriers are required to comply with the assistance capability requirements of CALEA Section 103(a), which Congress intended would speak for itself. CALEA places the initial responsibility for deciding how the assistance capability requirements in Section 103(a) are to be implemented on industry through the standard-setting process.³⁵ In the words of the D.C. Circuit Court of Appeals, “Congress gave the telecommunications industry the first crack at developing standards, authorizing the Commission to alter those standards only if it found them ‘deficient.’”³⁶ Thus, the Commission’s decision to announce CALEA’s applicability to particular services without defining how the assistance capability requirements apply to those services is entirely consistent with the statutory framework contemplated by Congress.³⁷

Furthermore, Requestors’ claim that no compliance deadline can be imposed until every last legal issue is answered is directly contrary to the statutory scheme. As explained above, CALEA does not contemplate that compliance efforts will be deferred until after the Commission decides how the statute’s assistance capability requirements apply to particular services. In short, the statute does not provide a blanket extension to

³⁵ 47 U.S.C. § 1006.

³⁶ *U.S. Telecom Ass’n v. F.C.C.*, 227 F.3d 450, 461 (D.C. Cir. 2000).

³⁷ Requestors are incorrect to suggest that the Department of Justice’s comment that implementation matters should be handled through the statutory process of deficiency proceedings amounts to confusion about what CALEA means. *See* Stay Request at 7. What is more, any suggestion that the Department of Justice has not been forthcoming with its needs with regard to the technologies at issue in the *CALEA Broadband Order* is simply inaccurate. The Department has worked extensively in a number of fora to express its needs and to discuss these issues with industry. Those cooperative efforts have already resulted in the publication of at least one technical standard that meets law enforcement’s needs.

run concurrently with compliance efforts. Rather, the statute explicitly provides that absence of technical requirements or standards does not relieve a carrier of the obligations imposed by Section 103.³⁸ The Commission thus acted reasonably in “acknowledg[ing] that providers need a reasonable amount of time to come into compliance with all relevant CALEA requirements” and establishing the 18-month period.³⁹

Third, Requestors suggest that the deadline will improperly delegate authority over what CALEA compliance means to the Federal Bureau of Investigation. This claim is simply untrue. The Commission retains full authority to decide all compliance matters delegated to it by the statute, and anyone wishing to bring such a matter to the Commission for resolution remains free to do so at any time. Not only does CALEA prohibit law enforcement agencies from requiring any specific design of equipment, facilities, services, features, or system configurations;⁴⁰ but the standard-setting process also prevents the government from dictating compliance terms to providers, since industry groups are free to publish technical standards that serve as “safe harbors” even if law enforcement agencies do not concur with the content of those standards.⁴¹

Fourth, Requestors accuse the Commission of ignoring cost, privacy, and security concerns in making determinations under the Substantial Replacement Provision

³⁸ 47 U.S.C. § 1006(a)(3).

³⁹ *CALEA Broadband Order* ¶46.

⁴⁰ 47 U.S.C. § 1002(b)(1)(A).

⁴¹ *See* 47 U.S.C. §§ 1006(a)(1) and (a)(2).

(“SRP”).⁴² The Commission considered the entire record in making its determination – a record that included information on each of these topics.⁴³

In any event, the Commission was under no legal obligation to condition the exercise of its authority under the SRP on specific findings regarding cost, privacy, and security. CALEA provides other mechanisms for taking account of cost considerations and ensuring that CALEA compliance is not unduly burdensome.⁴⁴ Further, requiring providers to comply with CALEA actually enhances, rather than diminishes, privacy and security, because CALEA itself obligates providers to take steps to protect those interests – obligations that do not attach to non-statutory, voluntary cooperation by entities that are outside the scope of CALEA.⁴⁵

Finally, Requestors claim that uncertainty about the Commission’s findings on coverage and exemption issues could result in misdirected or unnecessary costs.⁴⁶ As explained in Section I above, Requestors have failed to meet the four requirements for a stay with regard to this allegation of the potential for misdirected efforts. For the same reasons that this argument should be rejected with regard to a stay pending judicial review, it should be rejected with regard to a stay pending further Commission action.

⁴² 47 U.S.C. § 1001(8)(B)(ii).

⁴³ The Commission found it proper to rely primarily on the factors specifically mentioned by Congress that do not include cost, security, or privacy, but left open the possibility of considering other factors in the future. *CALEA Broadband Order* ¶ 14.

⁴⁴ See 47 U.S.C. §§ 1006(b)(1), 1006(b)(3), 1007(a)(2), 1008(b).

⁴⁵ See 47 U.S.C. §§ 1002(a)(4)(A), 1004.

⁴⁶ Stay Request at 13-15.

Conclusion

Although Requestors clearly have strong disagreements with the Commission's *CALEA Broadband Order*, they are free to advance these arguments in their pending court challenge to that order. However, for purposes of the stay request currently before the Commission, the Requestors offer no new information that should cause the Commission to abandon the implementation path laid out in the *CALEA Broadband Order*. The resolution of the threshold issue of who is covered by CALEA's general provisions was, in the Commission's own words, a "critical first step" in moving the debate forward. In addition, it was entirely consistent with the statutory scheme to allow industry, in the first instance, to define how CALEA's assistance capability requirements apply to particular services. The setting of a deadline provides needed incentive to all concerned to bring any issues they have to the table for resolution as quickly as possible. Should the goal of full compliance in a year and half's time turn out to be too aggressive, there is yet time to address justified requests for extension of that deadline.⁴⁷ Because Requestors have failed to meet the standard for a stay, the United States Department of Justice requests that the Commission deny the request for a stay of the *CALEA Broadband Order*.

⁴⁷ See 47 U.S.C. § 1008.

Dated: December 2, 2005

Respectfully submitted,
UNITED STATES DEPARTMENT OF JUSTICE

/s/ Laura H. Parsky
Laura H. Parsky
Deputy Assistant Attorney General
Criminal Division
United States Department of Justice
950 Pennsylvania Avenue, N.W.,
Room 2113
Washington, D.C. 20530
(202) 616-3928

and

/s/ Elaine N. Lammert
Elaine N. Lammert
Deputy General Counsel
Office of the General Counsel
Federal Bureau of Investigation
United States Department of Justice
J. Edgar Hoover Building
935 Pennsylvania Avenue, N.W.
Room 4735
Washington, D.C. 20535
(202) 324-1530

and

/s/ Cynthia R. Ryan
Cynthia R. Ryan
Special Counsel
Office of Chief Counsel
Drug Enforcement Administration
United States Department of Justice
Washington, D.C. 20537
(202) 307-7322